SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 361

E. W. CLARK,
Commissioner of Insurance of the State of Iowa, as Receiver of Federal Surety Company, Petitioner,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,
As Trustees of Gordon Campbell-Kevin Syndicate, a Common-Law Trust, and Gordon Campbell-Kevin Syndicate, a Common-Law Trust, Respondents.

Supplemental Brief of Respondents in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Montana

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Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

I

STATEMENT

This brief is filed as supplemental to the one filed herein in resistance to the petition for certiorari.

By the Judgment of the Supreme Court of the State of Montana entered herein July 24, 1934 (R. 21) (Mieyr v. Federal Surety Co., 34 Pac. (2d) 982), the Supreme Court of Montana recognized the position of Petitioner, Clark, as "the official liquidator—the successor to the corporation—and not a mere equity receiver, and that his title is the consequence of a succession established for the corporation by the law of its

creation" (R. 6). In accordance with the prior decision of the Supreme Court of the United States herein (Clark v. Williard, 292 U. S. 112; 78 L. Ed. 1160), tht Supreme Court of Montana determined and declared the policy of the laws of Montana as follows:

> "When, however, the legislature has spoken upon a particular subject and within the limits of its constitutional powers, its utterance is the public policy of the State." (R. 7.)

The Montana court recognized the fact that it had "under consideration the assets of a dissolved foreign corporation and the claim of a statutory liquidator to the assets" (R. 7). It found that the title of the statutory liquidator appointed by the laws of Iowa was similar to the title of statutory trustees designated by the laws of Montana (R. 8), and declared:

> "The Trustees of a dissolved corporation acting pursuant to section 6011, may be sued in the courts (Gilna v. Barker, 78 Mont. 357, 254 Pac. 174). The property of the dissolved corporation so being administered, is subject to attachment in the same manner and in the same cases where a writ of attachment would run against the property of the corporation itself." (Citing cases.) (R. 8.)

And the Court held that in cases where "the directors of a dissolved corporation for any cause become the statutory trustees, the insolvent corporations are not excluded from the operation of the statutes." (R. 9.)

> "A debtor may pay one creditor in preference to another (Sec. 8601, Rev. Codes 1921). An insolvent corporation, in the absence of statutory prohibition, may prefer one creditor over another, the rule being the same with reference to corporations as it is to individuals (Ames & Frost v. Heslet, 19 Mont. 188, 47 Pac. 805). It was there contended that a different rule should prevail with reference to corporations from the prevailing rule applicable to individuals. In response to the argument the court said: 'The policy of allowing such preferences may be pernicious, even more so that that of allowing an insolvent individual to prefer creditors; but in the one case, as in

the other, it is for the legislature to decide the question of policy, not the court.' " (R. 9.)

The Court further said:

> "Full faith and credit must be given to the decree of the Iowa court and the statutes of that state in this respect, that Clark was entitled to the property, not as an ordinary receiver, but as a quasi-assignee of the dissolved corporation by force of statute entitled of right to defend or sue in its stead in this state. (United States Truck Co. v. Pennsylvania Surety Corporation, 259 Mich. 422, 243 N. W. 311). **But the laws of the state of Iowa do not have extraterritorial force. Rights and remedies of property are governed by the laws of the state in which it is situated.**" (Italics ours.) (R. 11.)

In consequence of the statutory provisions in Montana thus interpreted by the Supreme Court of that state, the court found that the rights of respondents herein as execution creditors of Federal Surety Company were superior to the rights of the petitioner Clark, insofar as they had obtained liens upon property of the defunct corporation situated within the State of Montana prior to the appointment of a receiver on August 3, 1932 (R. 15). The sole question that remains in this case is, whether a state has the power to enact statutes of the character of those existing in Montana and enforce them as against property situated within its borders. In other words, does the full faith and credit clause of the Federal Constitution deprive the State of Montana of power to control the transfer and disposition of property situated within its borders where its laws conflict with the laws of a foreign jurisdiction in which an insolvent corporation happened to be organized?

II

THE ABSOLUTE POWER OF A STATE TO CONTROL THE TRANSFER AND DISTRIBUTION OF PROPERTY SITUATED WITHIN ITS BORDERS IS NOT IN ANY MAN-

NER AFFECTED BY THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION.

> "In the absence of any particular agreement or of particular provisions in the acts of admission varying the ordinary rules, the jurisdiction of a state is coextensive with its boundaries, extending throughout its territorial limits **and operating upon all the persons and things located or situated there,** and, conversely, limited to its own territorial limits and not extending beyond its boundaries." (Italics ours.)
>
> 59 C. J. 21.
>
> "The state regulates its domestic commerce, contracts, **the transmission of estates, real and personal,** and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government." (Italics ours.)
>
> Thurlow v. The Commonwealth of Mass., 5 How. (US) 504, 588, 12 L. Ed. 256, at 294.

The same general principle was stated by Mr. Justice Field in Pennoyer v. Neff:

> "So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claim of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate."
>
> Pennoyer v. Neff, 24 L. Ed. p. 565, at 569, 95 U. S. 679 at 723.

In the case of U. S. v. Fox, the Supreme Court of the United

States sustained a New York statute which in effect declared that a devise of real property to the United States was invalid. The opinion of the court was rendered by Mr. Justice Field, and in declaring the absolute power of the state to regulate the acquisition and tenure of property within its borders, said:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick v. Sullivant, 10 Wheat., 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

United States v. Fox, 94 US 315, 24 L. Ed. 192.

But the power of the State over the acquisition and tenure of personal property is equally as broad as over real property.

Nor is it material that the Court may be of the opinion that the Iowa statutes express a wiser or more equitable policy than the Montana statutes. The question is not one of wisdom but of the power of the state to control property within its own boundaries. The statement of legal principles by Chief Justice Taney in the License cases is pertinent.

> "Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power. Are the States absolutely prohibited by the Constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of

the State, or whatever the real object of the law; and it requires no law of Congress to control or to annul them."

License Cases, 5 How. 504, at 583, 12 L. Ed. 256 at 292.

III

THE IOWA STATUTE PURPORTING TO VEST TITLE OF A CORPORATION IN CLARK, AS COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, CAN HAVE NO EFFECT UPON PROPERTY SITUATED BEYOND THE BORDERS OF IOWA, EXCEPT AS A MATTER OF INTERSTATE OR INTERNATIONAL COMITY.

"As a general rule, no law has any effect, of its own force, beyond the territorial limits of the sovereignty from which its authority is derived."

25 RCL Sec. 29, p. 781.

"No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."

Hilton v. Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. Ed. 95.

"The legislative authority of every state must spend its force within the territorial limits of the state."

Cooley on Constitutional Limitations (8th Ed.), p. 248.

Thus, a statute and judgment for divorce prohibiting the guilty party from marrying again, is without effect outside of the territorial limits of the prohibiting state.

"It is almost universally conceded that statutes prohibiting the guilty party to a judgment of divorce from marrying again, either for a certain period, or while the other party to the former marriage lives, are without effect outside of the territorial limits of the prohibiting state."

5 RCL p. 1004.

Phillips v. Madrid, 83 Me. 205, 22 Atl. 114, 12 ASR 770, 12 LRA 862 and note.

West Cambridge v. Lexington, 1 Pick. (Mass.) 506, 11 Am. Dec. 231, Note 60 ASR 941.

Owen v. Owen, 178 Wis. 609, 190 NW 363, 32 ALR 1100.

Likewise, the bankruptcy or insolvency laws of one state can have no effect upon property situated in another state.

> "Bankruptcy or insolvency proceedings in one state have no effect of their own force on property situated within another state, and the receiver or assignee may not claim such property as a matter of right."
>
> 5 RCL 1026, Note 12.

In Harrison v. Sterry, 5 Cranch. 289, 3 L. Ed. 104, Chief Justice Marshall stated the rule as follows:

> "As the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States, the remaining two-thirds of the fund are liable to the attaching creditors according to the legal preference obtained by their attachments."

In Cook v. Moffatt, 5 How. 29, 12 L. Ed. 159, Mr. Justice Grier, speaking for the court said:

> "It is true that as between the several states of this union, their respective bankruptcy laws like those of foreign states, can have no effect in any forum beyond their respective limits unless by comity. But it is not a necessary consequence that state courts can treat this such as if the states were wholly foreign to each other, **and inflict her bankrupt laws on contracts and persons not within her limits.**" (Italics ours.)

To the same effect see:

Reynolds v. Adden, 136 US 348, 10 S. Ct. 843, 34 L. Ed. 360.

> "Nor is it a matter of concern whether the trustee appointed in such proceedings be known as assignee, syndic, curator, or receiver; the rights, liabilities, powers and duties of all are about the same."
>
> 5 RCL p. 1026, Note 7.
> Note 23 LRA p. 46.

In Barth v. Bakus, 140 NY 230, 23 LRA 47, the Court of Appeals of the State of New York held that a title to personal

property acquired in invitum under foreign insolvent or bankrupt laws, go according to the law of the jurisdiction where the proceedings were taken, will not be recognized in another jurisdiction where it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, and said:

> "This exception proceeds upon the view that to give effect to such a transfer arising by operation of law and not based upon the voluntary exercise by the owner of the **jus disponendi** would be to give the foreign law an extra-territorial operation which the rule of comity ought not to permit to the prejudice of suitors in another jurisdiction."
>
> See 8549 Fletcher's Enc. Corp. Vo. 17 (Permanent Ed.).

After stating that voluntary assignments will be recognized in a foreign state, the author says:

> "A somewhat different rule applies to transfers or assignments **in invitum** by process of law, or under insolvency or bankruptcy acts. While the authorities on this subject are not altogether harmonious, it is generally held that involuntary assignments for the benefit of creditors, made under a state's insolvency or bankruptcy laws, operate only upon property of the corporation within the state, and not upon property located elsewhere."

In Green v. Van Buskirk, 74 US (7 Wall.) 139, 19 L. Ed. 109, the facts were that on the 3rd day of November, 1857, one Bates who lived in Troy, New York, and owned certain iron safes in Chicago, Illinois, in order to secure an existing indebtness to Van Buskirk and others, executed and delivered in the State of New York to them a chattel mortgage on the safes. Two days after this, Green, the plaintiff in error, also a creditor of Bates, sued out of the proper court of Illinois a writ of attachment, caused it to be levied on these safes, got judgment in the attachment suit and had the safes sold in satisfaction of his debt. Green, Van Buskirk and Bates were all citizens of

New York. Van Buskirk then brought suit against Green for taking and converting the safes. The Supreme Court of the United States, speaking through Mr. Justice Davis, declared the rule that the State of Illinois had complete dominion over all transfers of personal property within its territorial limits, and said:

> "We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicil will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a vexed question, on which learned courts have differed; but after all there is not absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer with that of the State where the owner lives."
>
> 19 L. Ed. at 113.

The same rule is stated in Ruling Case Law as follows:

> "The dominion of a state over personal property within its borders is complete and its right to regulate its transfer and subject it to process and execution in its own way and by its own laws is unquestioned."
>
> 5 RCL 927, and cases cited.

In Direction Der Disconto vs. U. S. Steel Corporation, 267 US 22, 45 S. Ct. 207, 69 L. Ed. 495, this court, speaking through Mr. Justice Holmes, said:

> "But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holders having given value or taking without notice of outstanding claims, **but upon the things done being sufficient by the law of the place to transfer the title."** (Italics ours.)

The provisions of the Iowa statute forbidding the prosecutions of suits in the Montana court or seizure of property situated in Montana need not be given extraterritorial effect under the "full faith and credit" clause of the Constitution.

Atchison etc. R. Co. v. Sowers, 213 US 55, 29 S. Ct. 397, 53 L. Ed. 695.

Tenn. Coal Etc. Co. v. Goerge, 233 US 354, 34 S. Ct. 587, 58 L. Ed. 997, LRA 1916D 685.

Kerney v. Supreme Lodge, 252 US 411, 40 S. Ct. 371, 64 L. Ed. 638, 10 ALR 716.

The decision of the Supreme Court of Montana rendered herein July 24, 1934 (R. 5-15) answers definitely and fully the question submitted as to public policy existing in Montana. No question now remains except as to the power of the State of Montana to thus control the transfer, tenure and distribution of real or personal property situated within its borders. We respectfully submit that the "full faith and credit" clause of the Federal Constitution does not require the State of Montana to surrender to a foreign jurisdiction its control over real and personal property situated within the territorial limits of Montana. The petitioner cites no authority that in any manner sustains such a conclusion. The wisdom of the Montana statutory policy is, of course, not involved (See excerpt from License Cases, quoted supra). The question is merely one of the power of the sovereign state of Montana over property situated within its territorial limits, or conversely stated, the power of the State of Iowa to control the acquisition, tenure or distribution of real and personal property situated beyond its territorial limits and dispose of such property in a manner in conflict with the laws of the state in which the property is situated. The judgment of the Montana court should be affirmed.

IV

THE DECISION OF THE MONTANA COURT IS CORRECT IN ANY VIEW OF THE CASE. FEDERAL SURETY COMPANY DID NOT BRING IOWA'S LIQUIDATOR STATUTE INTO MONTANA AS A PART OF ITS CHARTER.

UNDER NO THEORY WOULD RESPONDENTS BE BOUND BY THE DECREE.

A very questionable doctrine and one which clashes with the general rule, is claimed to exist to the effect that where a statutory provision with regard to the winding up of a corporation is a part of the corporation's charter, it comes into a foreign state with the corporation. We say this is a questionable doctrine in view of the authorities carefully epitomized in the text statement of the leading author on corporations. This court has correctly announced in this same litigation that the matter rests entirely in comity.

Clark vs. Williard, supra.
Sec. 8549, Fletcher Enc. Corp. Permanent Ed. Vol. 17.
See Security Trust Co. v. Dodd, 173 U. S. 624; 43 L. Ed. 835; 19 Sup. Ct. 545.

The doctrine of Relfe v. Rundle has always for its premise, the assumption that where one **voluntarily** contracts with a foreign corporation, he is bound by the laws governing the corporation. Where, as here, there is no voluntary contract, for that reason alone, the respondents are not bound by the law of Iowa.

In the appendix hereto is a copy of the Montana statute with regard to attachments.

A surety company is qualified to write an attachment bond; and an attachment bond is written and filed without consulting with the attachment debtor. While an attachment bond is a contract, it is not a contract into which he has voluntarily entered.

The general insolvency laws of a state do not go with a foreign corporation into a sister state.

Sec. 8320 Fletcher Enc. Corp. Per. Ed. Vol. 17.
See also Sec. 8318 Fletcher, Vol. 17.

On the subject of statutes as a part of the charter, and the assumption that those are brought into the state, Fletcher on Corporations, Sec. 8318, Vol. 17 Per. Ed. says:

> "It is manifest that a contract made by a corporation in a state other than of its creation, is not affected by subsequent legislation in the state by which the corporation was created, as such—subsequent legislation can have no extraterritorial nor retrospective effect."
>
> See also, Prov. Sav. Life Ins. Society of N Y. vs. Bailey, 118 Ky. 36; 80 S. W. 452.

This cause of action arose over liabilities incurred by Federal Surety Company on the 15th day of January, 1925. (R. 79.)

The amended complaint of respondents (R. 72 to 82), was filed January 31st, 1928.

Iowa had no "liquidator" statute (1) when the Federal Surety Company came into Montana; (2) when it executed the bond and incurred the liability which later resulted in the judgment which has occasioned this litigation; and (3) it had no such statute when respondents' instituted the action.

The liquidator statute, or what is claimed to be such, was not adopted in Iowa until April 9th, 1929 (Chap. 223, Laws 43rd Session of the Legislative assembly of Iowa for the year 1929; now Sec. 8613 cl., Code of Iowa, 1931). (Appendix p. iii, Petitioner's Brief in support of petition.)

It will be conceded that the foundation for any exception to the general rule, that insolvency statutes generally are not brought into a state with the corporation charter, is not present nor controlling. The statutes we have seen, which were not in force at the time the corporation came into the state are not, when subsequently enacted, considered as brought in as a part of the charter. This case rests upon a clear differentiation of the doctrine of Relfe v. Rundle, cited by petitioner.

V

THE HIGHEST RESPECT AND THE FULLEST RENDERING OF FAITH AND CREDIT TO A FOREIGN JUDGMENT, IS TO DETERMINE ITS EFFECT AT HOME AND ACCORD THAT EFFECT WHEN IT IS CONSIDERED IN A SISTER STATE.

If the statutes of Iowa are to be given force, they should be given no greater force than that accorded them by the Supreme Court of that State.

In the appendix to petitioner's brief (p. ii) in support of the petition herein, appears cited and quoted Sec. 8402 of the Iowa Code, reading as follows:

> "An action therefor may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them."

In Watts vs. Southern Surety Co., 248 N. W. 347, the Court, in this very kind of a case, quotes this statute, and gives special emphasis to the last sentence. There the Court said:

> "By the statute authorizing his appointment it was specifically provided that **all rights possessed by creditors at that time were reserved.** The plaintiff in this case was a creditor, and had the rights given him by statute under the attachment and garnishment proceedings. The appointment of the intervener was made subject to these rights. It will not do to say that all his rights were cut off by the receivership proceedings."

Therefore, when Clark was appointed in the instant case, his power was by statute subordinated to the rights of creditors. If so at home, his powers were equally circumscribed abroad.

There, as here, the action by the creditor was first instituted. One cannot read the Watts case without perceiving the fallacy of petitioner's position.

CHARTER LIMITATIONS:

Only those voluntarily contracting with a foreign corporation are bound by its charter.

12 R. C. L. Sec. 15, p. 24.

Only those statutes controlling a corporation at home, and which, under rules of comity, will be given force away from home, will be recognized in a foreign jurisdiction.

12 R. C. L. 25, Sec. 16.

Persons **contracting** with a foreign corporation are presumed to know its charter provisions. Even such persons cannot be held to know, or be bound by legislation to be enacted in the future.

14 A. C. J. 1233, Sec. 3942.

This is as far as the doctrine goes. Even had this been a **voluntary contract,** there was nothing in 1925 in the charter which would have given notice of the claimed limitation. As the matter then stood,

Booth v. Clark, 17 How. 322, 15 L. Ed. 164,

was the ruling doctrine.

Ayres v. Siebel, 82 Iowa 347, 47 N. W. 989;
Parker v. Lamb, 99 Iowa 265, 68 N. W. 686, 34 L. R. A. 704;
State Bank v. McElroy, 106 Iowa 258, 76 N. W. 715;
Nebraska F. Ins. Co. v. Eaton, 107 Iowa 214, 77 N. W. 865, 43 L. R. A. 695, 70 Am. St. Rep. 193.

And this is the universally recognized rule.

Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725;
Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545;
Booth v. Clark, 17 How. 322, 15 L. Ed. 164;
Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380;
Great Western Min. etc. Co. vs. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163.

If such a statute as Sec. 8613 cl. of the 1931 Iowa Code is now a part of the charter of Federal Surety Co., it was not, as we have seen, such at the time the rights of respondents arose. It would follow, then, that at most, it must be conceded to have no greater effect than an amendment of a charter. But that will not aid petitioner.

In 14 C. J. 197, it is said:

> "The mere amendment of a charter or articles of incorporation does not create a new corporation or **otherwise affect the identity of the corporation, or its existing rights of action, property rights, or liabilities**; * *" (Italics ours.)

RESUME

It will be seen from the authorities cited in this brief and in the brief filed in opposition to the granting of the petition for writ of certiorai that:

(1) If the judgment complained of is reversed, it will necessitate the overruling of all substantial American authorities which hold that one state cannot legislate for another.

(2) That all American authority holding that the construction of statutes and the announcement of doctrines which affect judgments emanating from the highest court of the state whence the judgment comes, is the highest test to be applied under the faith and credit clause must be overruled.

(3) That it will be necessary to declare contrary to all established American authority, that a state is not supreme within its borders concerning the devolution of title to property, both real and personal.

(4) It will be necessary to reverse that long line of cases which hold that the insolvency statutes of a sister state have no force and effect beyond the borders of the state.

(5) That if the judgment is reversed, the rules of comity heretofore recognized are abrogated.

(6) If the judgment be reversed it will be necessary to overrule Booth v. Clark, 17 How. 322; 16 L. Ed. 164.

(7) It will necessitate, if the judgment be reversed, to hold that a foreign corporation when it comes into a state, not only brings the general statutes of the state of its incorporation with it, but that it also brings with it, **all future** legislation which may be enacted by the legislature of its home state, and which legislation affects rights which have grown up and ripened **into** liability before the new legislation was enacted.

Respectfully submitted,

LOUIS P. DONOVAN,

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APPENDIX

Rev. Codes Mont. 1921. Undertaking. Before issuing the writ, the Clerk must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties to be approved by the Clerk, in a sum not less than double the amount claimed by the plaintiff, if such amount be one thousand dollars or under, or, in case the amount so claimed by plaintiff shall exceed one thousand dollars, then in a sum equal to such amount, but in no case shall an undertaking be required exceeding in amount the sum of ten thousand dollars. The condition of such undertaking shall be to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing out of the

attachment, not exceeding the sum specified in the undertaking. Within five days after service of the summons in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two days nor more than five days, must justify before a judge of the district court, or before the clerk thereof, and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment.